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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROGERS HAMILTON,
PETITIONER

V.

GENERAL MOTORS CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE UNITED STATES SUPREME COURT:

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EXPLANATION OF RECORD REFERENCES

All record references in this petition are to the trial testimony. The trial testimony is numbered consecutively, starting with Page 1 through 1108, in Volumes 4 through 7 of the Original Record on Appeal.

Except where otherwise indicated, in the portions of the record which have been quoted directly, the person doing the questioning is the Petitioner's lawyer.

OPINIONS AND ORDERS DELIVERED IN THE COURTS BELOW

The three-judge panel of the United States Court of Appeals for the Fifth Circuit decided this case on November 14, 1979 in a published opinion, Hamilton v. General Motors Corporation, 606 F.2d 576 (5th Cir. 1979). The Court of Appeals denied rehearing en banc on January 28, 1980, at 611 F.2d 882.

The United States District Court's judgment of January 31, 1979, contained findings of fact and conclusions of law, but the Court did not issue an opinion. The trial court's judgment and findings of fact and conclusions of law are attached as part of the appendix.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked under 28 U.S.C., §2101(c) to seek review of the decision of the Court of Appeals entered on November 14, 1979, which affirmed the district court's judgment in favor of General Motors in this racial discrimination case, which was brought by Rogers Hamilton under Title VII of the Civil Rights Act of 1964 and 42 U.S.C., §1981.

The United States Court of Appeals for the Fifth Circuit denied Petitioner's Petition Suggesting Rehearing En Banc by an order entered on January 28, 1980 (611 F.2d 882).

QUESTIONS PRESENTED FOR REVIEW

(1) DOES GENERAL MOTORS' USE OF A SUBJECTIVE ORAL INTERVIEW IN ITS APPLICATION PROCESS FOR ENTRY INTO SKILLED TRADES OPERATE AS A "READY MECHANISM" FOR DISCRIMINATION AGAINST BLACKS AND THEREFORE VIOLATE TITLE VII AND 42 U.S.C., § 1981?

(2) IS THE SUBJECTIVITY OF THE ORAL INTERVIEW CURED BY THE PROVISION IN THE COLLECTIVE BARGAINING AGREEMENT ALLOWING AN APPLICANT TO QUALIFY FOR SKILLED TRADES IF HE OR SHE HAS EIGHT YEARS EXPERIENCE AS AN ELECTRICIAN OR, IS THE EVALUATION OF AN APPLICANT'S WORK EXPERIENCE ALSO SUBJECT TO ABUSES WHICH ALLOW DISCRIMINATORY HIRING DECISIONS?

STATUTES INVOLVED IN THIS CASE

This case involves a construction of the meaning of Title VII of the Civil Rights Act of 1964. Specifically involved is the provision prohibiting racial discrimination by employers, 42 U.S.C., §2000e-2(a), Pub. L. 88-352, Title VII, §703, July 2, 1964, 78 Stat, 255. That provision is set out in the appendix.

Also involved is the construction of 42 U.S.C., §1981 (Act May 31, 1870, c.114, §16, 16 Stat. 144). The text of the statute is set out in the appendix.

STATEMENT OF THE CASE

This is a racial discrimination case which was brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C., §1981. Jurisdiction of the Trial Court was invoked pursuant to 28 U.S.C., § 1343 and 42 U.S.C., § 2000e-5 (f) (3).

The Arlington plant of General Motors Corporation has been in operation since 1953. (R.733). When he was finally hired on July 1, 1974 after having been refused employment in 1969, 1971, 1972 and on May 8, 1974, Rogers Hamilton became the first black to work in the Skilled Trades Department at the Arlington plant. (R.529).

On April 7, 1969, Hamilton was refused employment as an electrician on the basis that he had flunked his physical. This was a pretext for racial discrimination. One of the reasons given for Hamilton's failing the physical was that the tip section of his right middle finger was stiff. However, 10 days before Hamilton's flunk, the plant doctor had passed a white electrical applicant who was missing his entire left index finger. (R427-428).

General Motors again refused to hire Hamilton on May 8, 1974. (R474). Hamilton was subjected to an almost two-month long intensive investigation into

his job experience before he was hired on July 1, 1974. This two-month gap resulted in lost pay and lost seniority, which has caused even more lost pay because Hamilton has been laid off several times due to reductions in force, when he would not have been laid off if he had been given his rightful seniority.

In sharp contrast to the almost two-month long hassle Hamilton endured in 1974, nine white electricians were hired almost as soon as they applied, and without having submitted any documentation of previous employment. (Plaintiff's Exhibit #4). Hamilton was ultimately found to have been qualified. (R992). The justification given by General Motors for this disparate treatment is that Hamilton was flunked on an oral interview by the plant's chief electrician. The testimony of General Motors' management-level witnesses shows, however, that this oral interview was not governed by any written guidelines, that there were no safeguards to avert discriminatory practices, and that the oral interview was of critical importance in the application process. The oral interview by the chief electrician is a mechanism for racial discrimination.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Although the United States Supreme Court has addressed the general problem of facially neutral "procedures" used by employers to exclude blacks, as in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, (1971), the Court has never addressed the specific problem presented by the use of subjective oral interviews. The use of a subjective, standardless oral interview as a device to discriminate against blacks who are seeking jobs in the skilled trades is illustrated by the record in this case.

In an era in which employers have become increasingly more subtle in the ways in which they discriminate, the issue of the use of subjective oral interviews is one which takes on extreme importance. Involved in this case are the Skilled Trades hiring procedures of the Arlington, Texas, plant of General Motors Corporation, which is one of the largest and most influential employers in the Dallas-Fort Worth area. For approximately 21 years after the plant opened in 1953 there were no blacks hired to work in the Skilled Trades division. The record in this case brings one to the sad conclusion that blacks can expect to be discriminated against when they are evaluated by whites. The obser-

vation by Chief Judge Brown in Rowe v. General Motors Corporation, 457 F.2d 348, 359 (5th Cir. 1972), correctly assesses the uphill fight faced by blacks.

> ...all we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from whites can expect non-discriminatory action... (emphasis added.)

The method by which General Motors chooses people for entry into Skilled Trades is a classic example of a giant corporation's use of facially neutral "procedures" as a device to exclude blacks from skilled jobs. These methods amount to a rigged game in employment; their use has been condemned in the landmark case of Rowe v. General Motors Corporation, 457 F.2d 348 (5th Cir. 1972) and in the recent case of Parson v. Kaiser Aluminum, 575

F.2d 1374 (5th Cir. 1978).

On May 8, 1974, Rogers Hamilton applied for a job as an electrician in General Motors' Skilled Trades Department at its plant in Arlington, Texas. Mr. Hamilton underwent an interview by a personnel employee; his work history was rated "very good" and his experience in the "job desired" was rated "very good" (R463). He received a favorable evaluation from the interviewer, William Roach, who then reported to Jack Hogge, Supervisor of Employment, that he had an applicant who might qualify for the job (R464).

But because of an unfavorable evaluation by Dale Hurd, the plant's chief electrician, who gave Mr. Hamilton an oral interview later in the day, General Motors on May 8, 1974, refused to hire Rogers Hamilton as an electrician. Jack Hogge testified as follows:

> Q. All right now, on May 8, 1974, did you, on your authority from General Motors, refuse to hire Rogers Hamilton?
>
> A. Yes, sir, as an electrician.
>
> (R474)

After Rogers Hamilton asserted to General Motors that he knew he had been refused employment because of his race and after General Motors had subjected

him to an almost two-month long hassle in which an intensive investigation on his previous employment was done, Mr. Hamilton was hired as an electrician on or about July 1, 1974. Mr. Hamilton was ultimately found to have been qualified as an electrician. On that point, Don Whitney, who was then head of Labor Relations at the Arlington plant, testified as follows:

> Q. Your Labor Relations Division, though, qualified Mr. Hamilton for employment, didn't they? Your earlier testimony was he qualified?
>
> A. Qualified him?
>
> Q. Yes.
>
> A. In terms of the standards that were approvable under our agreement we said he was qualified, yes. (R992).

In glaring contrast to the two-month long hassle which Rogers Hamilton had to endure, nine white persons who applied at approximately the same time as Hamilton were hired very soon after they applied and without having to submit any documentation of their previous employment. Seven of the nine white persons were hired within a week after they applied. In all

nine cases documentation of previous employment was not submitted until long after the date the person was hired. Plaintiff's Exhibit #4, which is set out on the following two (2) pages, illustrates this disparate treatment:

DATES OF APPLICATION, HIRE AND SUBMISSION OF DOCUMENTATION

	Name	Race	Date Applied	Date Hired	Date Submitted Documentation
1.	W.R. Keene	Caucasian	5-02-74	5-06-74	8-13-74 8-14-74
2.	J.R. Banks	Caucasian	5-06-74	5-08-74	6-18-74 6-22-74 9-16-74
3.	H.V. Cunningham	Caucasian	5-06-74	5-08-74	6-17-74 8-30-74 9-12-74
4.	P.J. Blubaugh	Caucasian	5-07-74	5-10-74	6-17-74 6-21-74 7-03-74
5.	R.H. Foreman	Caucasian	5-07-74	5-08-74	6-20-74

DATES OF APPLICATION, HIRE AND SUBMISSION OF DOCUMENTATION

	Name	Race	Date Applied	Date Hired	Date Submitted Documentation
6.	R.G. Mitchell	Caucasian	5-07-74	5-10-74	6-23-74 6-30-74 10-03-74
7.	E.W. Hillin	Caucasian	5-13-74	5-28-74	8-10-74 8-13-74
8.	L.E. Taylor	Caucasian	5-14-74	5-28-74	5-13-74 6-18-74
9.	J.L. VanLoon	Caucasian	6-17-74	6-24-74	7-22-74 7-23-74 8-14-74 3-20-75
10.	Rogers Hamilton	Black	5-08-74	7-01-74	7-16-74 7-18-74

Further emphasizing this profile of unequal treatment is the fact that three of the white people who were hired at the same time Hamilton was refused employment were either working with Hamilton at American Manufacturing Company at the time they applied, or had been working with him in the recent past. (R 468-473). Jack Hogge testified that he made no check on the three white applicants who had worked at American Manufacturing. For example:

> Q. And P.J. Blubaugh, was he doing the same type of work as Mr. Hamilton was doing at American Manufacturing?
>
> A. I don't know. He was working at the same company. I don't know if they were doing the same job.
>
> Q. The reason you don't know that is that you didn't check him out either, did you?
>
> A. No, sir, I did not.
>
> (R 470.)

They were, in fact, doing the same type of work as Mr. Hamilton. This is clear from P.J. Blubaugh's testimony. (R 761-762.)

What explanation, then, does General Motors make for this disparate treatment? General Motors says that the nine white men passed their oral interview with Dale Hurd, the plant's chief electrician, and Rogers Hamilton did not. The discussion on the following pages will detail the character of this oral interview. It is the same type of practice which was held violative of Title VII in Rowe v. General Motors Corporation, supra, p. 12 . It is a subjective interview which is carried out without the restriction of written guidelines; it has no safeguards to avert discriminatory practices; and it is the most critical part of the application process, Parson v. Kaiser Aluminum and Chemical Corp., 575 F.2d 1374, 1385 (5th Cir. 1978). We should have long ago progressed past the point where blacks must prove their qualifications to whites who are vested with sweeping, unfettered discretion in their hiring decisions.

There is really no dispute about the facts concerning how the chief electrician's oral interview is conducted. These facts are found in the testimony of General Motors' own management-level employees. The vagueness and subjectivity of the oral interview are evident from the testimony of Jack Hogge, General Motors' Supervisor of Employment. Also evident is the fact that the chief electrician is given absolute discretion

over the content of the interview and the decision on whether he will recommend that the applicant be hired:

Q. All right, was Mr. Hamilton then interviewed by Mr. Hurd?

A. Yes, sir, he was.

Q. Do you know what that interview consisted of?

A. No, sir, I wasn't at the interview.

Q. All right, and at some point were you notified of Mr. Hurd's evaluation?

A. Yes, sir, I was.

Q. All right, and what was that evaluation?

A. Mr. Hurd said that Mr. Hamilton did not qualify as an electrician.

Q. All right, and did he tell you--did he give you the basis for that evaluation?

A. No, he did not.

Q. Did you ask him for what his reason was that this man who was apparently qualified had now been found not to be qualified?

A. No, sir, I didn't ask him for an explanation.

Q. In the ordinary course of things would you ask for an explanation if Mr. Hurd told you someone was not qualified?

A. No, sir, I would not.

Q. You just take his word on it?

A. Yes, sir.

Q. Just yes or no?

A. Yes.

Q. If the man is not qualified that is good enough for you?

A. Yes, sir.

Q. I guess you would rely quite a bit on someone in a position of responsibility like Mr. Hurd, is that correct?

A. Yes, sir, I do.

(R465-466.)

Mr. Hogge also testified that the interview that applicants have with Dale Hurd, the chief electrician, is of critical importance:

Q. In the application process, as far as electricians are concerned, is that interview that the applicant has with Mr. Hurd a pretty important step in the process?

A. Yes, sir, I would think so.

Q. It is of critical importance, isn't it?

A. Yes, sir.
(R 466.)

Jack Hogge further testified that there are no safeguards to avert racial discrimination:

Q. In that interview that Mr. Hurd holds with these applicants, are there any safeguards that are set up to guard against racial discrimination?

A. I have never been in any of the interviews. It is an employment interview as

far as an individual applying for a particular trade.

Q. Well, it sounds like you just take his word on it, yes or no, whether a person is qualified. It doesn't sound like there is much in the way of safeguards there, does it?

A. I have never questioned it.
(R 468)

The chief electrician, Dale Hurd, has been conducting oral interviews on electrician applicants since 1959 or 1960 and during that time, he has interviewed only two blacks--Rogers Hamilton and one other person:

Q. So then perhaps we need to talk about this anyway. So since 1959 or 1960, you have interviewed two blacks, one of them broke off the interview and said, "I can't do the work," and the other one (Hamilton) said you were unfair. Now isn't that right?

A. That's right.
(R 724 and 727)

Mr. Hurd's testimony establishes that he has never been given any written guidelines governing the content of the oral interview and that he is given complete, unfettered discretion concerning the interview. His testimony also demonstrates that there are no safeguards to prevent discrimination; the nature of the interview is such that Mr. Hurd can use the interview as a device to discriminate, without any fear of being detected. Dale Hurd testified as follows:

Q. All right, Mr. Hurd, in conducting this interview you conducted that you just testified about, have you ever been given any written instructions --let me rephrase that. Have you ever been given any written guidelines about what the content of that interview is supposed to be?

A. No, I have not.

Q. You are completely left to conduct that interview and make the content of that interview whatever you wish, are you not?

A. That is correct.

Q. And nobody checks you on that, do they?

A. No, they do not.

Q. And never have?

A. No, they haven't. Except when we had the test, then they graded the test. But since we eliminated the test, there is no way to check it.

(R 723.)

Hurd's testimony furnishes further evidence to the effect that his evaluation of an applicant cannot be examined:

Q. Mr. Hurd, do you have a record--is there a copy of that diagram you said Rogers Hamilton drew wrong in '74?

A. No, I don't have a copy of it.

Q. Does the corporation have a copy of it?

A. If it is, he would have it in his personnel file. We didn't usually keep them, no, sir.

Q. Didn't usually keep them?

A. No, sir, not the drawings, no, sir.

Q. It was not your routine to keep drawings like that you had had made by an applicant in an interview?

A. No, it was not.

Q. Then it would be pretty hard for anybody to check to see whether that drawing would be really wrong, wouldn't it?

A. Yes, it would.

Q. Be impossible, wouldn't it?

A. That's right.
(R721 - 722.)

Under questioning by the Court, Dale Hurd testified further about the lack of instructions about the interview:

Q. Have you been given any instructions by your superiors with regard to how to interview or not interview applicants?

A. No, sir. I sat in on one interview many years ago when I first started interviewing electricians. Now we gave the test for several years and through those I determined, you know, what questions I would ask and so on. But as far as sitting down and saying, "you ask these questions, determine this and this," no sir.
(R 748.)

Mr. Hurd's response shows that, in addition to all the other deficiencies of this subjective oral interview, he was using questions from a written test which had previously been given and which had never been validated. (Please see testimony of William Todd, at R 457 - 459).

Sometime after he was refused employment on May 8, 1974, Rogers Hamilton called Jack Hogge to complain that he had been discriminated against because of his race. (R 521). Hogge's first response was to offer Hamilton another interview with Dale Hurd. After Hamilton stated the obvious--that Hurd would simply discriminate against him again (R 65)--Hogge arranged for an interview with Sam Pollock, a foreman who did not usually conduct such interviews. It is clear from the testimony that Pollock's interview was of

the same type as Hurd's. General Motors rigged this interview, too, by telling Pollock that Hamilton had already been flunked by Dale Hurd:

Q. Mr. Pollock, I believe your testimony was that you were called off the floor and went to see Mr. Hogge and he told you that he wanted you to interview an electrical applicant named Hamilton and that this man had been interviewed previously by Dale Hurd and Hurd had turned him down, is that correct?

A. That is correct.
(R 1057-1058.)

That the characteristics of Sam Pollock's interview were the same as Dale Hurd's is demonstrated by the following testimony from Mr. Pollock:

Q. Now, you--just for clarification, you have never been given any written instructions or any written guidelines as to how these interviews are to be conducted?

A. No written guidelines as such, no, other than the test that I mentioned earlier.

Q. Oh, you were using it as a guideline?

A. Prior to 1972 when I was electrical foreman I very definitely used it as a guideline.

Q. All right, other than that, after that written test was discontinued, were there ever any other written guidelines given you on how to conduct these interviews?

A. No.

Q. Were there any oral instructions given you on how to conduct these interviews?

A. No.

Q. They just relied on your experience as an electrician and said, "Hey Mr. Pollock, interview this man and tell us if he is qualified or not," didn't they?

A. That is correct.
(R 1058-1059.)

From the testimony of General Motors' own management-level employees,

there can be no doubt about the subjective and discriminatory character of the oral interview with the chief electrician, Dale Hurd, and with the foreman, Sam Pollock. This record paints an unmistakable picture of how this subjective oral interview has been used as a device to discriminate against black applicants for Skilled Trades. In addition to Rowe v. General Motors Corporation, supra, p. 12 , and Parson v. Kaiser Aluminum, supra, p.12,13 , another significant decision which bears on this issue is EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975). In that case, at p. 313, the Court condemned the employer's heavy reliance on subjective judgments of interviewers, affirming the lower court's finding that the process discriminates against black applicants.

The following language from the District Court's opinion, Stamps v. Detroit Edison Co., 365 F.Supp. 87 (E.D. Michigan 1973), fits the instant case. The Court said at p.117:

> Where few blacks are hired overall and none have been hired in some departments, and ultimate hiring authority is left with white supervisors, it must be inferred that these supervisors have resisted the hiring of blacks for reasons of race, and the continuation of this practice is unlawful. (Citing Rowe v. General Motors Corporation, supra, p. 12). (Emphasis added.)

Even though the illegality of the oral interview by the chief electrician is clear from the face of the record in this case, the Court of Appeals seemed bent on avoiding the question. The Court of Appeals held that since the trial court had found that appellant was not qualified to be an electrician in 1974, no prima facie case had been established (Panel Opinion, at Appendix, p. 52). Judged by any fair standard, however, the trial court's finding is "clearly erroneous." As set out at p. 14 of this petition, the head of the Labor Relations Division testified that Rogers Hamilton was qualified:

> A. In terms of the standards that were approvable under our agreement we said he was qualified, yes.
> (R 992).

That testimony should have ended the inquiry as to Hamilton's qualifications.

Moreover, a finding of nondiscrimination is a finding of ultimate fact that can be reversed free of the

clearly erroneous rule, and Rule 52(a) does not apply to findings made under an erroneous view of controlling legal principles. Parson, supra, p. 12 , at p.1382.

The District Court's only finding of fact on Mr. Hamilton's qualifications was as follows:

> 40. On May 8, 1974, when Plaintiff applied to Defendant for work as an electrician, he did not have the 8 years electrical experience required by the GMC-UAW agreement then in effect, having done journeyman electrical work only since May 23, 1968.

This finding of fact is insufficient as a finding of subsidiary facts. It is as defective as the finding of fact in Parson v. Kaiser Aluminum:

> The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because

> he was not qualified. In fact, other black men have made foreman and other salaried positions in a number of departments of the Chalmette Works.
>
> (at 575 F.2nd 1382)

Of this finding, Judge Brown said at p. 1383:

> The District Judge offered no hints as to the basis for his finding that Parson was not qualified for promotion to the position of foreman. We are simply unable to determine whether the Judge found sufficient subsidiary facts to undergird the ultimate finding that the decision not to promote Parson was not racially motivated or taken in retaliation for his involvement in racial relations at the plant. It is therefore necessary for us to reverse the dismissal of Parson's claim and remand for an articulation of the basis for the Judge's conclusion that Parson was not qualified to become a foreman. This articulation is to include an examination of the comparative qualifications of non-blacks promoted to foreman.
>
> (Emphasis added.)

At the time of his application of May 8, 1974, Rogers Hamilton had been working as an electrician for 15 years. Many, many pages of the record in this case deal with his qualifications. But the trial judge gives no hint as to any basis for his finding that Hamilton's electrical experience was not sufficient.

Since finding Number 40 is insufficient, this Court is not bound by it and can make an independent review of the record. The only review necessary on the point of qualifications is to recognize that General Motors' head of Labor Relations Division said they found Hamilton to be qualified.
(R 992.)

All of the Findings of Fact made by the trial court concerning the oral interviews by the Chief Electrician, Dale Hurd, and the oral interview by Sam Pollock were made under an erroneous view of controlling legal principles--with the controlling cases being Rowe v. General Motors and Parson v. Kaiser Aluminum.

There can be no doubt from the testimony in this case that the oral interview by the chief electrician renders the hiring procedure fatally defective. But the holding of the Court of Appeals is that the subjectivity is cured by the existence of provisions in the collective bargaining agreement dealing with qualifications. This interpretation by the panel emasculates Rowe and Parson. A fatally subjective hiring process cannot be saved by the fact that an agreement between the employer and the union provides that an applicant can qualify if he or she has had 8 years experience as an electrician or the functional equivalent. Indeed, the Fifth Circuit has strongly indicated in Parson that the requirement of prior industrial experience may itself violate Title VII:

> The statistical evidence, with the testimony by individual members of the class as to obstacles they encountered in seeking entry to the crafts, requires the conclusion that the Plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect. Kaiser therefore has the burden of showing that the prior experience requirement has "a manifest relationship" to the legitimate needs of the craft positions.
> (at 575 F.2d 1390)
> (Emphasis added)

It is worth noting also that Kaiser's requirement was 5 years prior industrial experience. (Please see dis-

cussion in United Steelworkers, et al v. Weber, at 99 S.Ct. 2721 (1979), at p.2731).

Appellant did not attack the requirement of 8 years experience in the trial court because at the time he applied on May 8, 1974, Rogers Hamilton had 15 years experience as an electrician. The District Court's insufficient finding of fact to the contrary cannot be justified by any interpretation of this record. Certainly, the requirement of 8 years prior experience as an electrician or the functional equivalent, because of the strong indication in Parson that it violates Title VII, cannot be used to cure a fatally subjective hiring process.

Further, the application of the 8 years experience requirement is itself subjective and subject to abuse. General Motors makes it part of the subjective oral interview; part of what the chief electrician does during the oral interview is to quiz the applicant about the character of his experience. (R 696.) So, the most crucial evaluation of an applicant's experience is done in the very interview which is used as a "ready mechanism" for racial discrimination.

The 8 years experience requirement does not cure the subjectivity of General Motors' hiring procedure for Skilled Trades. Instead, in the case

of blacks, it operates to incorporate the racial prejudices of previous employers into the General Motors' hiring process. This was true of at least three of Rogers Hamilton's previous employers. Jack Hogge of General Motors talked to someone named "Sarge" at Leonard's, one of Mr. Hamilton's previous employers. Fully 8 years after Hamilton had left the employ of Leonard's, where he worked for 3 years, the first thing Sarge had to tell his prospective employer was that he thought Hamilton was hired in 1963 because Leonard's was being picketed by blacks. (R 477.) That is racist behavior. Hogge contacted American Manufacturing Company twice. The first time he talked to someone in the Personnel Department, who without much knowledge of the actual facts, gave him an unfavorable report. (R 482.) But on the second contact, Hogge got what he characterized as a favorable report. (R484.) It is reasonable to assume that there was a racist motivation behind the unfavorable report which was given the first time. On May 21, 1974, Mr. Ingram of the Stevens Corporation gave Mr. Hamilton an unfavorable evaluation. On May 28, 1974, he called Jack Hogge of General Motors and told him that he felt as if he had not given Hamilton a fair and complete evaluation. (R 491.) When Jack Hogge and Dale Hurd, the chief electrician, talked to Hamilton's former supervisor at Stevens, they got a glowing report:

A. Re: Rogers Hamilton, 6-5-74. Dale Hurd and J. Hogge talked to Fred Hall (former employer at Stevens). Mr. Hall indicated that at one time at Stevens Hamilton worked as a helper then for a couple of years in all types of electrical work, such as wiring the presses, running circuits, following prints, working on motors, starters, transformers, et cetera. He indicated he performed journeyman's work. He also stated that at American Manufacturing the work was very hazardous and personally he would not work there. But Hamilton was working there as a Class A electrician and they worked a lot of electrical transformer devices and so forth. He gave Hamilton a good recommendation.
(R 489.)

In addition to the other errors made by the trial court and perpetuated by the Court of Appeals, the trial court and the Court of Appeals have each chosen to ignore an overwhelmingly important item of evidence: that the Arlington plant of General Motors Corporation has been in operation since 1953 (R 733.), but when he was hired on July 1, 1974, Rogers

Hamilton became the first black to work in the Skilled Trades Department at the Arlington plant. (R 529). Not one word is said by either the trial court or the Court of Appeals about this significant fact, which is by itself, prima facie proof of discrimination.

In addition to their total disregard of the teachings of Rowe v. General Motors, supra, p. 12, the Court of Appeals has made a specific remark about Rowe which appears to be in error. The Court of Appeals said at Appendix, p. 52 of the Opinion:

> In Rowe we found a promotion procedure requiring a recommendation of the immediate foreman to be inconsistent with Title VII. The recommendation included an experience factor which no black could then meet.

Appellant's lawyer has searched the opinion in Rowe for any emphasis on "an experience factor" and has found none. In fact, I can find no mention of "an experience factor."

Finally, the Court of Appeals held that the appellant was hired as an electrician as part of an informal affirmative action program such as was recently approved by the Supreme Court in United Steelworkers v. Weber, ____U.S.____, 99 S.Ct. 2721, 61

L.Ed.2d 480 (1979). The Court of Appeals' holding represents the most cynical interpretation of this record that could be imagined. There are many factors, most of them blatantly obvious, which distinguish this case from Weber, but it is enough to point out a few. In Weber, the employer and the union had agreed to reserve 50 percent of the openings in a crafts training program for blacks; there was no reservation of any positions for blacks by General Motors. More importantly, though, General Motors did not initiate any action to hire Rogers Hamilton. Instead, through the use of a racially discriminatory device they refused him a job on May 8, 1974. There would have been no further action by General Motors. But Rogers Hamilton called Jack Hogge of personnel later in the day on May 8th to tell him he thought he had been refused employment "because of the color of my skin." (R 61). A meeting was held the next day between Hamilton and Hogge, along with some other personnel types. (R 62, 63). Rogers Hamilton remained accusatory; he used wording in that meeting that would indicate to any halfway intelligent person that he was prepared to file a charge of racial discrimination against General Motors. This is no case of a benevolent act by a giant corporation. Once General Motors realized that Mr. Hamilton was prepared to take action against them and after a seven-week attempt showed

them that they could not discredit his qualifications, they knew they had to hire him.

The most appalling aspect of the Court of Appeals' decision is that they have taken Weber, a good and progressive decision and used it to defeat Title VII. If this decision is left standing, any employer can discriminatorily refuse employment to blacks and then if a black applicant makes an issue of the refusal, the employer can spend an indefinite period of time trying to discredit the applicant's qualifications. The only blacks who will get hired are those who are assertive enough to stick it out through long periods of third-degree type attempts to discredit their qualifications. The employer can then say: "Pardon us, the delay was not discrimination, it just took us a while to decide that we need to hire a black for our plant."

PRAYER

Petitioner Rogers Hamilton requests that the Supreme Court grant a Writ of Certiorari and consider this case on its merits.

Respectfully submitted,

BY: Bill Kimble

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that copies of the foreoing have this the 24th day of April, 1980, been served upon Mr. Ira Butler, Sr., 1800 First National Bank Building, Fort Worth, Texas 76102; Mr. Edward L. Kemble, 1800 First National Bank Building, Fort Worth, Texas 76102 and Mr. J.R. Wheatley, 3044 West Grand Boulevard, Detroit, Michigan 48202, counsel of record for Respondent in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid addressed to said counsel at their post office addresses. Three (3) copies of the Petition for Writ of Certiorari have been sent to each of Respondent's lawyers.

Don Gladden

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ROGERS HAMILTON, Individually and on behalf of others similarly situated,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

No. 79-2139

Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Nov. 14, 1979

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

POLITZ, Circuit Judge.

Appellant, a black man, filed suit against his employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and under 42 U.S.C. §1981, alleging racial discrimination in employment practices. The district court found that the complainant had failed to establish the prima facie case of racial discrimination as required for a Title VII case by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93S.Ct. 1817, 36 L.Ed.2d 668 (1973). The relief sought, including an injunction against alleged harassment and retaliation, was denied. We affirm.

In 1969 appellant sought employment as an assembly worker in defendant's plant in Arlington, Texas. He failed the employment physical and was immediately so advised. On May 8, 1974, he applied for employment as an electrician and he was hired on July 1, 1974.[1]

The relief sought under Title VII and the Civil Rights Act was for the defendant's failure to hire in 1969 and for the damages sustained by virtue of the delay between the application in May 1974 and the hiring seven weeks later. Appellant also claimed entitlement to injunctive relief against harassment and other retaliation for the attempts to assert his rights under Title VII.

Appellant raises three issues on appeal. First, he contends the refusal of employement in 1969 was the product of racial discrimination. Second, he contends the delay in hiring him in 1974 was likewise racially motivated and discriminatory, complaining that there were others more rapidly hired and that defendant conducted employment interviews which were violative of the standards expressed by this court in Rowe v. General

1. Complainant claims he also applied for employment in 1971 and 1972 and was rejected contrary to Title VII. The district court found no such application was made. Appellant offers nothing to convince that this was error.

Motors Corp., 457 F.2d 348 (5th Cir. 1972), and Parson v. Kaiser Aluminum and Chemical Corp., 575 F.2d 1374 (5th Cir. 1978). Finally, he claims error in the denial of the injunction.

THE 1969 EMPLOYMENT APPLICATION

(1) The threshold consideration of the 1969 employment dispute is its timeliness. A jurisdictional prerequisite to a Title VII action is the timely filing of a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC complaint must be filed within 180 days of the alleged discriminatory act. 42 U.S.C. §2000e-5(e); McArthur v. Southern Airways, Inc., 569 F.2d 276 (5th Cir. 1978) (en banc); Chappell v. Emco Machine Works Co., 601 F.2d 1295 (5th Cir. 1979). Appellant first filed with the EEOC on June 18, 1974.

(2,3) Appellant's claim under §1981 is similarly time tarred. In such actions applicable state statutes of limitation are to be applied. Shelly v. Bayou Metals, 561 F.2d 1209 (5th Cir. 1977); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974). Reversed on other grounds 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). In this instance Art. 5526 of Texas Rev.Civ.Stat.Ann., providing for a two year period, is controlling. Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979); Green v. Forney Engineering Co., 589 F.2d 243 (5th Cir. 1979). The instant suit was filed August 4, 1975.

(4,5) Appellant insists that the running of the prescriptive periods was tolled until 1974 when he passed the employment physical given by the same doctor who had earlier failed him. Appellant claims that it was only then that he realized the 1969 rejection had been racially motivated. Equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. Chappell, supra; Bickham v. Miller, 584 F.2d 736 (5th Cir. 1978); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); Franks, supra. On April 7, 1969, within twenty minutes of completion of the physical examination, appellant was informed he had failed. An employee in defendant's personnel section told appellant he should have passed the physical. Appellant later passed physical examinations administered by his family doctor and by a doctor of another major corporate employer. Despite this information, appellant did nothing for several years. Under these circumstances, neither the EEOC filing period or the Texas statute of limitations is subject to equitable tolling. The claim based on the 1969 physical examination and its results have not been timely presented. Consideration of this claim is, accordingly, barred.

THE 1974 EMPLOYMENT APPLICATION

Appellant complains of what he considers to be inordinate delay between his application and his actual hiring in 1974. He complains of loss of seniority occasioned by this delay and notes that others, all white, were more quickly hired. Appellant contends that he was subjected to discrimination inherent in oral employment interviews, which he argues violate the Rowe standards. He further complained that he was required to make proof of prior employment.

The National Collective Bargaining Agreements between defendant and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, required that all electricians at the Arlington plant meet certain tests or have eight years of journeyman experience or the equivalent thereof. In 1974 defendant instituted a program for hiring electricians which required, inter alia, interviews and verification of prior work experience. The chief electrician concluded that appellant was not qualified as a journeyman electrician. Appellant complained and was then interviewed by defendant's general maintenance foreman who came to the same conclusion. Despite this appellant was hired as an electrician. We are convinced from the record that defendant's higher level management wanted to hire blacks in skilled

trades, an obvious informal affirmative action pursuit.

The collective bargaining agreement prescribes that to be eligible for employment as an electrician an applicant must: (1) have journeyman status, (2) have completed an apprentice-training course, (3) have previously carried journeyman status in a General Motors plant subject to a previous bargaining agreement, or (4) have had eight years experience as an electrician or the functional equivalent. Appellant did not meet any of these requirements. He does not challenge their validity or propriety.

The district court found that the temporary hiring process for electricians in 1974 had six steps: (1) a finding that the application, on its face, reflected the necessary qualifications, (2) a finding by the employment interviewer that the applicant "might be qualified", (3) concurrence by the employment supervisor in that finding, (4) approval of the applicant by the chief electrician, (5) approval by the labor relations department, and (6) verification of the asserted prior work experience. The court found that the interview by the chief electrician was done without regard to race and that the questions dealt with simply principles of electricity. The follow-up interview by the general maintenance foreman was similarly conducted.

Appellant argues that the employment process was discriminatory, that the interviews lacked objective guidelines and were mere shields for such discrimination, and that the employment procedure followed was not attuned to the expressions by this court and is therefore invalid. We disagree.

(6,7) A plaintiff in a Title VII case need not show that his employer intentionally discriminated against him. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979). The Supreme Court in McDonnell enunicated four elements for a prima facie case: (1) plaintiff belongs to a protected minority, (2) plaintiff was qualified, (3) plaintiff's application was rejected, and (4) the employer continued to seek applicants with plaintiff's qualifications. See also Parson, supra, and Adams v. Reed, 567 F.2d 1283 (5th Cir. 1978). If the plaintiff establishes a prima facie case the responsibility shifts to the defendant to articulate legitimate nondiscriminatory reasons for its actions. If defendant does so articulate, the plaintiff is then allowed an opportunity to show that the reasons stated by defendant are in fact a pretext for prohibited discrimination.

(8) The court below found that appellant was not qualified to be an electrician in 1974 and thus no prima facie case had been established. Appellant now claims that the fact that there was a subjective oral interview in the employment process operated as a ready mechanism for discrimination, contrary to Rowe's mandates, and the process is thus, necessarily, invalid. From this he would insist the prima facie case has been made.

In Rowe we found a promotion procedure requiring a recommendation of the immediate foreman to be inconsistent with Title VII. The recommendation included an experience factor which no black could then meet. We there said (at page 359):

> "All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management."

In the instant case, unlike Rowe, there is a valid objective criterion, the qualification required by the

collective bargaining agreements. We are not prepared to say that the existence of subjective oral interviews in the employment process will render that process per se discriminatory where there are meaningful, known objective standards involved.

We are aware of no holding to the effect that a complainant who fails to satisfy a valid objective hiring criterion may nonetheless make out a prima facie case under McDonnell and Rowe by pointing to what may be considered an impermissible subjective interview. We do not now so hold. We do not suggest that an employer may not properly include interviews in its employment process. The test is one of objective fairness.

(9) Appellant would have us infer from the fact that he was hired on July 1, 1974, that he was qualified when he applied for work as an electrician on May 8, 1974, and therefore the delay was the fruit of racial discrimination. We decline to draw that inference. The record is clear. The appellant was hired as an electrician as part of an informal affirmative action program such as was recently approved by the Supreme Court in United Steelworkers v. Weber, ___ U.S. ___, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). We choose not to dampen the enthusiasm of employers to do that which defendant did herein when it hired appellant. There is decidedly

no justification for penalizing the defendant for not acting more quickly (the asserted delay between the application and the hiring) in an instance in which defendant could not have been legally faulted for not having acted at all.

(10) Finally, we conclude that injunctive relief is not appropriate. We have found no Title VII violation. And, further, we concur with the finding of the district court that the evidence does not support the claim that appellant has been given more difficult or dangerous job assignments because he filed the EEOC complaint and this law suit. Nor can defendant be found wanting because of the unacceptable and contemptible actions of one or more of appellant's coemployees since we find in the record that the defendant has taken reasonable steps to discourage such reprehensible activity.

For these reasons, the decision of the district court is:

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

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DENIALS OF REHEARING EN BANC

Title	Docket Number	Date of Denial	Citation of Panel Decision
Hamilton v. General Motors Corp.	79-2139	1/28/80	.N.D.Tex., 606 F.2d 576

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGERS HAMILTON	§	
	§	CIVIL ACTION
VS.	§	NO. CA 4-75-200
	§	
GENERAL MOTORS	§	
CORPORATION	§	

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is ORDERED and ADJUDGED that the plaintiff, ROGERS HAMILTON, take nothing, that the action be dismissed on the merits, and that each party bear its own costs of action.

Entered this 31st day of January, 1979.

SIGNED: Eldon B. Mahon, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGERS HAMILTON	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	CA 4-75-200
GENERAL MOTORS	§	
CORPORATION	§	

MEMORANDUM OPINION

This is a civil rights suit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. and 42 U.S.C. §1981. Plaintiff is a black male who alleges (1) that defendant refused to hire him in 1969, 1971 and 1972 because of his race, (2) that defendant delayed hiring him from May 8, 1974 to July 1, 1974, because of his race, (3) that defendant has subjected him to continuous racially motivated harassment while he has been employed by defendant, and (4) that defendant has harassed plaintiff in retaliation for a charge that plaintiff filed against defendant with the Equal Employment Opportunity Commission (EEOC). After carefully considering the evidence presented at trial, the Court has determined that plaintiff's claims are without merit and files these findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a black citizen of the United States and resides in Fort Worth, Tarrant County, Texas.

2. The defendant, General Motors Corporation, is incorporated under the laws of Delaware and is duly authorized to do business in Texas. Defendant operates through its GM Assembly Division an assembly plant at Arlington, Tarrant County, Texas, and is an employer within the meaning of 42 U.S.C. §2000e (b).

3. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 276 are labor organizations within the meaning of 42 U.S.C. §2000e (d) and are engaged in an industry affecting commerce.

4. Plaintiff is a member of UAW and its Local 276 and is a member of a unit of employees for which the UAW is the sole exclusive collective bargaining agent in respect to rates of pay, wages, hours of employment and other terms and conditions of employment as more fully set forth in the agreements between defendant and UAW and its Local 276.

5. The provisions of the national collective bargaining agreements between the defendant and the UAW in effect at all times pertinent to this

lawsuit have required that an applicant, to be eligible for employment as an electrician:

> (a) have journeyman status as such and as defined in and referred to in paragraphs 167 and 178 of the national GMC-UAW agreement, or
> (b) have completed a bonafide apprentice training course with similar standards to the GMC-UAW apprentice training program, or
> (c) have properly carried such journeyman status in any General Motors plant under the terms of previous agreements between General Motors Corporation and UAW, or
> (d) have 8 years equivalent experience in the trade as defined in section 167 and section 178 of the national GMC-UAW agreement.

These requirements are reasonably related to the heavy industrial electrical work demanded of electricians at defendant's Arlington, Texas, plant. The job of electrician at General Motors' Arlington plant is a critical job, involving the safety of employees and the efficient operation of the assembly line running. If the line should be shut down, 2000 employees would be standing idle. When electrical problems develop, these electricians must be qualified to act immediately and efficiently on their

own initiative.

6. Plaintiff applied to defendant's Arlington plant for employment in April, 1969. He was given a pre-employment physical examination on April 7, 1969, and was found by the plant's medical director to be unemployable under the standards required.

7. Plaintiff was advised by defendant on or about April 7, 1979, that he did not pass the physical examination.

8. The standards applied by the defendant's medical director in the 1969 physical examination of plaintiff were the same standards applied in physical examinations of white applicants.

9. The defendant's medical director's 1969 finding that Hamilton was unemployable was not racially motivated.

10. No employee or representative of General Motors Corporation ever suggested or intimated to the medical director of the plant or any member of his staff that there should be any difference in the standards applied in the physical examinations of black and white applicants and no such distinction was ever made in such examinations.

11. Plaintiff contends that he asked the medical director at the

General Motors plant "What did you turn me down for in 1969" and that the medical director responded to plaintiff, "I didn't turn you down in 1969." The Court finds that those statements were never made.

12. Plaintiff was not qualified to be hired by defendant as an electrician in 1969.

13. Plaintiff did not apply to defendant for a job as an electrician in 1969.

14. Race was not a factor in defendant's decision not to hire plaintiff in 1969.

15. Plaintiff was not hired by defendant in 1969 because he failed the physical examination.

16. Plaintiff did not file any charge against defendant with the EEOC within the time required by 42 U.S.C. §2000e after his application for employment at defendant's Arlington, Texas, plant in 1969.

17. Plaintiff did not file any suit against defendant based upon defendant's failure to hire him in 1969 with the time required to prevent any claim he could have asserted against defendant under 42 U.S.C. §1981 from being barred by the Texas statute of limitations.

18. The facts that form the basis of plaintiff's 1969 claim were apparent to plaintiff in 1969, and should have been apparent in 1969 to a person (1) who was similarly situated to plaintiff and (2) who possessed a reasonably prudent regard for his rights.

19. Plaintiff did not apply for employment with defendant in either 1971 or 1972.

20. Even if plaintiff had applied for employment with defendant in 1971 or 1972, he did not file within the applicable limitations period a charge with the EEOC or a lawsuit against defendant for defendant's alleged failure to then employ him.

21. The only charge filed by plaintiff against defendant with the EEOC was dated June 18, 1974, and received by EEOC on July 1, 1974.

22. The records in this cause and in this Court do not show a lawsuit alleging racial discrimination filed by plaintiff against defendant prior to August 4, 1975.

23. At the time plaintiff applied for employment at defendant's Arlington plant on May 8, 1974, defendant had openings for electricians.

24. Defendant requires all persons seeking employment as skilled trades journeymen (including electricians) to

provide documented proof of their prior work showing the required experience and qualifications of such applicants. Defendant is required by the terms of paragraph 178 of the national GMC-UAW agreement to furnish copies of all such documents upon request to the chairman of the shop committee of the local union.

25. At the time in 1974 when plaintiff applied, defendant was operating under the following temporary policy and practice: If (1) an application for employment as an electrician showed on its face that the applicant met the GMC-UAW agreement requirements, (2) the employment interviewer concluded that the applicant might be qualified, and (3) the supervisor of employment concurred, then the applicant was interviewed by the chief electrician. If the chief electrician approved, the application would be submitted to the labor relations department, and if approved there the applicant would be temporarily employed. This temporary employment was conditioned upon verification of the applicant's work experience. If the applicant's work experience was not verified and documented within a reasonable time, he would be terminated.

26. If an application showed that an applicant for skilled trades claimed journeyman electrician qualifications, as defined in the GMC-UAW agreements, the applicant could not

have been rejected by the supervisor of employment, the skilled trades interviewer, or the plant's medical director. Instead, any such application would have ultimately been referred to the labor relations department for its review and further handling by management before rejection.

27. At the time plaintiff applied to the plant for employment on May 8, 1974, as an electrician, he presented no written proof to verify his claim of journeyman status as an electrician or other required qualifications under the GMC-UAW agreement.

28. Plaintiff was interviewed by Bill Roach who reported to the supervisor of employment, Jack Hogge, that plaintiff might qualify. Hogge reviewed the application and authorized Roach to have plaintiff interviewed that day by Dale Hurd, the defendant's chief electrician.

29. Hurd reviewed plaintiff's application with him and inquired as to just what work he had done for the employers listed on his application. As related by plaintiff during the interview, his electrical work had consisted in most part of changing light bulbs, running conduits and hooking up extensions. Hurd then inquired of plaintiff the ways in which he would handle installations and other

electrical work performed by electricians at the General Motors plant. Plaintiff's answers indicated a lack of qualifications to do the work required. Hurd then drew a schematic of the simplest electrical equipment used at the plant and asked plaintiff to hook the wires up; plaintiff did not hook these up correctly. When asked about a fundamental principle of electricity, Ohms Law, plaintiff evidenced a lack of understanding. Hurd advised supervisor of employment Hogge that plaintiff was not qualified to be hired as an electrician.

30. The questions asked and problems posed by Hurd during his interview of plaintiff were the same as those used by Hurd when interviewing all applicants, including the white applicants that he interviewed for jobs as electricians during this emergency and found to be not qualified.

31. Plaintiff was advised by Hogge that it would be necessary for him to present written proof from former employers showing the required experience and qualifications to be further considered for employment as an electrician. Plaintiff stated that he would furnish such documentary proof.

32. On May 20, 1974, plaintiff told Hogge that he felt he had not received a fair interview. Hogge therefore arranged for plaintiff another interview with Sam Pollock, the gen-

eral foreman of maintenance who has had 27 years of electrical experience. Pollock interviewed plaintiff and reported to Hogge that plaintiff was not qualified under the GMC-UAW agreement. While a supervisor in the electrical department, Pollock had interviewed applicants for jobs at the plant as electricians and had found some lacking in the required experience and qualifications. He had not discussed with the chief electrician the latter's interview with plaintiff.

33. The interviews of plaintiff by defendant's chief electrician and general foreman of maintenance were fair and related directly to the qualifications of plaintiff to perform electrical work at the plant. Similar interviews were given and similar standards applied to the white applicants who applied for jobs as electricians during the 1974 emergency and were found not to be qualified and were not hired. Similar interviews were given and similar standards applied to those who were hired.

34. On May 20, 1974, plaintiff informed Hogge that he was having difficulty securing proof of his work experience. Hogge then called plaintiff's employer and various former employers in an attempt to verify plaintiff's experience and qualifications so that he could be temporarily hired and have additional time to furnish documentation and proof of his experience and qualifications.

35. On May 22, 1974, defendant decided to give plaintiff a pre-employment physical examination while the investifation of his qualifications continued. He was examined and approved by the plant's medical director, with certain work restrictions.

36. The responses which the employment supervisor Hogge received from plaintiff's employer and former employers indicated that plaintiff did not have the required electrical qualifications for work at the plant. During the week of June 17, 1974, Hogge submitted to the labor relations department plaintiff's application and all of the information which had been gathered from plaintiff's former employers.

37. Notwithstanding doubt on the part of the defendant as to plaintiff's qualifications, after extended conferences between the supervisor of labor relations and the plant manager, the manager of personnel and the plant engineer, plaintiff was notified on June 28, 1974, that he would be hired effective July 1, 1974, but would be required to furnish the documentary proof of his required experience and qualifications.

38. The delay between the time of plaintiff's application and the date of his employment was attributable solely to the difficulty defendant encountered in verifying plaintiff's

electrical experience and his qualifications as a journeyman electrician as provided by the GMC-UAW agreements.

39. Defendant assisted plaintiff in every reasonable way to obtain verification that plaintiff's work experience and qualifications met the requirements of the GMC-UAW agreements.

40. On May 8, 1974, when plaintiff applied to defendant for work as an electrician, he did not have the 8 years electrical experience required by the GMC-UAW agreement then in effect, having done journeyman electrical work only since May 23, 1968.

41. Defendant has never given plaintiff more difficult job assignments than it has given white employees.

42. Defendant has never withheld tools from plaintiff which were necessary to perform the work that he was assigned.

43. Plaintiff was never given work assignments which violated any medical restrictions under which he was working. Plaintiff was not required to simultaneously lift two wheels totaling 45 pounds during the time when he was under a doctor's orders not to lift more than 25 pounds. Plaintiff was told by defendant that he could lift each wheel individually and that he could work at whatever pace he could

manage.

44. Under the provisions of the GMC-UAW supplemental agreement of November 19, 1973, which was in effect in 1974 and 1975, defendant's hourly employees were provided with insurance covering hospital, medical, surgical, prescriptions and dental expenses without cost to them. The coverage commenced on the first day of the second month after an employee's date of hire and extended through the month following the month when the employee might be laid off. Plaintiff went on sick leave on November 25, 1974, during which time his insurance should have been kept in effect. On December 2, 1974, there was a reduction in work force and plaintiff would have been laid off but for the fact that he was on sick leave. The information on employees' coverage is computerized. The notice of the accident of November 25, 1974, had been put in the computer. Through inadvertence, the notice of the layoff of December 2 was also put in the computer. This resulted in the termination of plaintiff's insurance coverage on the last day of the following month. When the error was brought to defendant's attention, the insurance coverage was reinstated to the date of its termination. Similar errors were made at the time involving five white employees. During a layoff in September of 1975, plaintiff's insurance was cancelled effective November 1, 1975,

which would have been correct except for a supplemental agreement between GMC and UAW, made earlier in 1975, extending the time of coverage after a layoff. The notice of this extension was overlooked when the information on plaintiff's layoff was computerized. When the error was discovered, plaintiff's insurance was reinstated as of November 1975. All of plaintiff's claims during both periods were paid by defendant's insurance carriers. Defendant's employees who processed this information on insurance coverage did not know whether an employee was white or black. These two incidents were clerical errors and not racially motivated.

45. During the course of his employment plaintiff was embroiled in numerous and continuous disputes with his supervisors.

46. Defendant's safety rules and regulations applicable to electricians, which plaintiff was familiar with, provide in part 3, "Eye protection must be worn while operating any power equipment or machinery, or while working in specified eye protection areas of the plant." Despite repeated requests, admonitions, and instructions by defendant's supervisors, plaintiff refused to wear safety glasses until the matter was submitted to labor relations.

47. Plaintiff received a disciplinary layoff for a violation of defendant's shop Rule 14. This layoff lasted for the balance of the shift and the following day. Plaintiff's duties include keeping spot weld guns repaired. These are necessary to keep the assembly line in operation. Because of plaintiff's failure to properly repair a spot weld gun the night before, that gun and two other guns required repairs at the beginning of an ensuing shift. Plaintiff called his supervisor and asked for assistance and a co-worker was sent to help him. After the co-worker had repaired one gun, he noticed that plaintiff had not properly repaired the gun he had been working on and explained this to plaintiff and agreed to help him further. Although the assembly line was running and the guns were needed, plaintiff without any word to the co-worker as to where he was going, left the place where they were working. In his absence, the supervisor and the co-worker repaired the guns. When plaintiff returned and the supervisor requested an explanation of his unauthorized absence, plaintiff replied that he had gone to get a soft drink.

48. The only other disciplinary action by the defendant against plaintiff was a routine reprimand. Plaintiff was assigned the task of overhauling a spot weld gun. The gun was not properly overhauled and would not operate when needed on the assembly

line of the next shift.

49. Plaintiff was never requested by defendant's supervisors to plug a power panel module or electrical starter control into a hot line and never did so.

50. Plaintiff was never requested by defendant's supervisors to cut a 277 volt line and never did so.

51. Plaintiff was never instructed by defendant's supervisor to hang or disconnect lights at great heights and to do so "like a monkey hanging by his tail."

52. Plaintiff's work assignments at defendant's Arlington plant were reasonable and not racially motivated.

53. Defendant has used all reasonable means to discourage and prevent racial slurs, epithets, and impositions from being directed by fellow workers toward black employees. There have been regular meetings of all supervisory and other salaried personnel at which video tapes from top corporate officials have been shown, including a message from the Chairman of the Board advising that any employee who did not comply with the corporation's non-discriminatory policy would not be working for it any longer.

54. Any finding of fact deemed to be a conclusion of law is so found.

SIGNED: Eldon B. Mahon, United States District Judge

§2000e-2. UNLAWFUL EMPLOYMENT PRACTICES--EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer--

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§1981. EQUAL RIGHTS UNDER THE LAW

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Supreme Court, U.S.
FILED
MAY 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1694

ROGERS HAMILTON, *Petitioner*

vs.

GENERAL MOTORS CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent's Brief In Opposition

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Respondent's Brief In Opposition

Petitioner does not present any special and important reason for granting a writ of certiorari within the scope of Rule 19 of the Rules of this Court. Petitioner cites no case, or other authority, bringing his Petition within that Rule. Petitioner's effort to secure further review by this Court is bottomed upon the false premise that the opinion below of the Court of Appeals has established a standard that abrogates its holdings in *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972) and *Parson v. Kaiser Aluminum*, 575 F.2d 1374 (5th Cir. 1978). There is also the pretense that Petitioner was subjected to a discriminatory subjective interview resulting in the delay of Respondent's hiring him.

When the Fifth Circuit's opinion is correctly interpreted in the light of the facts that:

(1) As a part of an emergency hiring procedure in 1974, Petitioner was interviewed by two white electricians (who had no authority to approve or reject his application) and admitted to them that his only electrical work had consisted of changing light bulbs, running short conduits and hooking up extensions; and

(2) Petitioner demonstrated to the interviewing electricians that he could not hook up wires to the simplest electrical equipment used at the Plant; and

(3) Petitioner, in effect, admitted he did not have the electrical experience required for the highly sensitive electrical work at the Assembly Plant, which requirements were set forth in the national bargaining agreements between General Motors Corporation and United Auto Workers; and

(4) Petitioner did not challenge in the trial court the validity or propriety of these national bargaining agreement requirements of experience and qualifications;

it readily appears that the Fifth Circuit has in no way repudiated *Rowe* or *Parson*.

OPINION BELOW

The opinion of the Court of Appeals is reported at 606 F.2d 576 (5th Cir. 1979). The denial of Petitioners' Motion for Rehearing en banc is reported at 611 F.2d 882. These, together with the District Court's Judgment and Memorandum Opinion, are all included in the Appendix to the Petition for Writ of Certiorari and hence are not repeated herein.

JURISDICTION

The jurisdictional requisites for filing the Petition for Certiorari are adequately set forth in the Petition. Respondent denies that the Petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner's two alleged questions as presented are not in fact proper questions because they are based upon false assumptions and are directly contradicted by the record in this case. Petitioner's statement of questions for review is, in effect, a summation of the grounds he urged in his Petition for Rehearing and Rehearing en banc in the Court of Appeals. There, he complained, as he does in the Petition in this Court, that the Fifth Circuit has misinterpreted and misapplied its own prior decisions. After consideration, however, the Petition for Rehearing was denied. No member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc, and the Petition for Rehearing en banc was also denied. Petitioner has presented no proper questions to this Court by the Petition for Writ of Certiorari. The only proper question is:

> Whether certiorari should be granted when review is being sought of a lower court decision which turns solely upon an analysis of the particular facts involved?

STATUTES INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) and of 42 U.S.C. §1981 are set forth in the Petition (pp. 73-74).

STATEMENT OF THE CASE

Respondent respectfully suggests that the statement contained in the opinion of the Court of Appeals for the Fifth Circuit properly sets forth all of the relevant facts. (606 F.2d 576, 578-581) Petitioner's statement of the case is inaccurate, incomplete, misleading and argumentative, compelling this counterstatement to correct his inaccuracy and omissions (Supreme Court Rule 40[3]).

At the Arlington, Texas, Plant of General Motors Corporation (GM), an electrician has a highly sensitive job. Qualified electricians are essential for the safety of other employees. They are necessary in order to keep the assembly line running. When the line is down, 2000 employees are idle. When electrical problems develop, electricians must be qualified to act immediately, efficiently and on their own initiative. (R. pp. 759-760)

The provisions of the national collective bargaining agreements between GM and UAW,[1] in effect at all pertinent times here involved, required 8 years journeyman experience or its equivalent of all electricians at the Plant. The agreements obligated GM to furnish

[1]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

the Union written verification of such experience by former employers of electricians hired. (Def. Exs. 1, 3, 5, 7; R. pp. 546-549) These provisions are reasonably related to the necessary duties of such employees. (R. pp. 693-694; p. 1049)

General Motors' Efforts for More Than 10 Years to Find Black Electricians

As the record shows, there were only 58 black electricians in the Fort Worth SMSA (Standard Metropolitan Statistical Area) and 100 black electricians in the Dallas SMSA or a total of 158 in the combined areas. Not all of these were journeymen electricians. (Def. Exs. 74, 75; R. p. 617; pp. 1004-1005)

GM had made diligent efforts for more than 10 years prior to trial of this case to find and hire black electricians. These efforts included extensive newspaper advertising in minority and large daily newspapers. GM's representatives attended meetings of black community agencies and minority organizations seeking black electrician prospects. They made trips to schools and colleges with high percentages of black students seeking to interest students in electrical work at the Plant. They made periodic reviews of all personnel files of black employees at the Plant for electrician prospects. Periodic inquiries were made of other industrial plants in the area for the names of black electricians such plants might contemplate laying off. (R. pp. 530-533; pp. 615-617)

Prior to the time Hamilton applied for a job as an

electrician on May 8, 1974, only one black person had ever applied for such a position at the Plant. That applicant concluded he could not do the work required of electricians at the Plant and withdrew his application. (R. p. 695)

General Motors' First Contact with Hamilton

On April 7, 1969, Hamilton applied for assembly work at the Plant. He did not apply for work as an electrician at that time. (R. pp. 387, 431-432, 449; pp. 981-982)[2]

When Hamilton applied to the Plant for assembly work in 1969, he was given a pre-employment physical examination but he did not meet the physical standards required of all such applicants. The Plant's Medical Director found him to be unemployable as an assembler primarily because of limited motion in his back. He "could not stoop to where his fingertips touched the floor, or thereabouts." The right middle finger, distal phalanx, was stiff. (R. pp. 394-397) The standards applied in the examination of Hamilton were the same applied in the examination of white and black applicants. (R. pp. 416-417, 430)

[2]Even though the trial court in Finding of Fact 13, based upon abundant evidence found, "Plaintiff did not apply to Defendant for a job as an electrician in 1969" (Pet. p. 61), Petitioner states, "on April 7, 1969, Hamilton was refused employment as an electrician. . . ." (Pet. p. 9).

The 1974 Emergency Hiring of Electricians by GM

In April of 1974, due to the oil embargo and energy crisis, GM decided to change its operations at the Arlington Plant so as to assemble smaller size automobiles. This required complete remodeling of the Plant and extensive industrial electrical work. The Plant's employment supervisor received a request for 15 additional electricians. In order to meet the immediate need for these electricians, GM adopted a temporary procedure under which an electrician applicant who did not furnish with his application verification of his experience as required by the GM-UAW agreement could be considered if his written application showed the required 8 years journeyman experience and qualifications. The applicant could be hired if (1) the employment supervisor approved of the acceptance of his application; (2) the chief electrician after interviewing the applicant believed him to be qualified and could meet the GM-UAW agreement requirements; and (3) the Plant's Labor Relations Department approved of the temporary employment.[3] However, under this procedure, an applicant was still required to furnish written verification of his experience and qualifications within a reasonable length of time. If he did not do so, he would be terminated. (R. pp. 519-520)

Twenty white persons who applied to GM for the positions of electrican were not hired during this emergency period from April 3 to August 7, 1974. One

[3]It was the function of Labor Relations to furnish UAW with written verification of a new employee's journeyman qualifications, as set forth in the national bargaining agreements.

applicant did not appear for his interview with the chief electrician. The remaining 19 white applicants were rejected because of insufficient experience and lack of required qualifications. (Def. Ex. 44; R. pp. 527-529)

During the same period, 13 white electricians were hired, being 39% of those who applied. (Pl. Ex. 7; R. p. 571)

The only black who applied was Hamilton. We next turn to GM's efforts to find him qualified so he could be hired.

Hamilton's Application

The precise procedure outlined above was followed by GM in connection with Hamilton's application. To be specific:

(1) Hamilton filed his application on May 8, 1974. (R. p. 18)

(2) Hamilton presented no written documentation to verify his claim of journeyman status or the required qualifications as an electrician under the GM-UAW agreement. He was first interviewed by Bill Roach. (R. pp. 520-522)

(3) Roach reported to Jack Hogge, employment supervisor, that he had interviewed Hamilton and "felt like we had an electrician that *might* qualify." (R. p. 520)

(4) Hogge reviewed the application and authorized Roach to have Hamilton interviewed by the Plant's chief electrician. (R. p. 520)

(5) Dale Hurd, the Plant's chief electrician, reviewed Hamilton's application with him and inquired as to just what work he had done for the employers listed on his application. Hamilton admitted that his electrical work had consisted principally of merely changing light bulbs, running short conduits and hooking up extensions, requiring little knowledge of electricity. Hurd then inquired of Hamilton the ways in which he would handle simple installations and other electrical work required to be performed by electricians at the Plant. Hamilton's answers indicated a complete lack of qualifications for such work. Hurd then drew a schematic of the simplest electrical equipment used at the Plant and asked Hamilton how he would hook up the wires on this equipment. Hamilton could not hook these up correctly. When asked about the fundamental principles of electricity, Hamilton showed a complete ignorance of these. Hurd advised Hogge that Hamilton did not have the qualifications of an electrician. (R. p. 465; pp. 696-702)[4]

(6) After getting Hurd's report, Hogge called Hamilton into his office and explained "that it didn't appear he had the qualifications" for the electrical work at the Plant but advised Hamilton if he would furnish "documentation of the type of work he had done in the past," he would "see if we couldn't hire

[4]Hamilton's application could not have been rejected by the chief electrician, the employment supervisor, any other GM employee who interviewed him, or labor relations. Instead such application could have been rejected only by the management committee which ultimately considered Hamilton's application. (R. p. 526)

him." Hamilton agreed that he would secure such documentation. (R. pp. 520-521)

Hogge heard nothing further from Hamilton for 12 days. On May 20, Hamilton called Hogge and reported that he was having difficulty securing written verification of his experience and he did not "have the money and time to get it." Hogge replied that he would do what he could to get such verification and commenced trying to do so. (R. pp. 521-525)

In the telephone conversation on May 20, Hamilton indicated to Hogge for the first time that he had not received a fair interview with Hurd. Hamilton was invited to return to the Plant on May 21 for an interview with another electrician. (R. p. 521)

Hamilton was interviewed by Sam Pollock, general maintenance foreman, with 27 years of electrical experience. He had not discussed with Hurd the latter's interview with Hamilton. After a long interview, Pollock reported to Hogge that Hamilton did not have the qualifications of a journeyman electrician. (R. pp. 1047-1057)

GM's Efforts to Find Hamilton Qualified

Notwithstanding the reports received from the chief electrician and the general maintenance foreman, the employment supervisor continued his efforts to find some basis for the Plant's hiring Hamilton. He called all of the former employers which Hamilton had listed (most of them several times) and inquired of other employers which he had learned of through his persis-

tent inquiries. As the employment supervisor testified, he was doing all he could "to get verification for him and see if we could help him." His inquiries continued and shortly after June 10, 1974, he contacted Big Tex Construction Company which reported that Hamilton had done some journeyman electrician work for it. This was the first report that Hamilton had done any work such as the Plant required and as contemplated by the GM-UAW agreement. (R. pp. 521-525) With respect to that conversation, the employment supervisor, Jack Hogge, testified:

> "THE COURT: For clarification, did you give what you found out from Big Tex? What did you find out?
>
> A. That he had worked running service to a mortuary in Duncanville, I believe it was, to King's Liquor Store, and had worked in putting in a shopping center. They did verify that.
>
> Q. For how long a period of time?
>
> A. Really two or three months in there, as best I could recall was about as long a period of time as it was." (R. p. 526)

After he had completed his investigation, Hogge testified that:

> "Then with all of this documentation that I had accumulated on my own, which was quite a bit involved—I had never done this before for any other employee—I took all of this documentation into the Labor Relations Department and had them to completely review it." (R. p. 526)

Hamilton's Former Employers Verified His Lack of Experience and Qualifications at Trial

Hamilton's former employers, who testified at trial, verified his lack of experience and qualifications as a journeyman electrician. The testimany showed that Hamilton had:

(a) Worked at the W. T. Waggoner Building from April, 1959, to June, 1963, as a general maintenance employee, replacing light bulbs, fluorescent lights and light switches. Electrical work there was done by "an outside electrician." (R. pp. 784-785)

(b) Worked at Leonard's from June, 1963, to January, 1966, running extension cords and short pieces of conduit and repairing lights occasionally. Real electrical work there was done by outside electricians. (R. pp. 898-900)

(c) Worked as an electrician trainee at Stevens Corporation from May, 1966, to May 13, 1968, when he was for the first time classified as a maintenance electrician. He was discharged on July 2, 1968, for tardiness and a bad attitude toward his work. He was re-employed in September of 1968 and worked as a maintenance electrician there to January, 1969. (R. pp. 838-840)

(d) Worked as an assembler for General Dynamics from April 22, 1969, to April 10, 1970, when he was laid off and again from May 12, 1970, to January, 1971, when he was discharged. He did not apply for nor perform electrical work there. Assemblers and

electricians belong to different unions there. Hamilton was a member of the machinists union. He was never a member of the electricians union and "was not qualified to be." (Def. Exs. 21, 86, 87, R. pp. 883-886, 895, 897)[5]

Although a journeyman electrician's license from governmental authority is not required by paragraph 178 of the GM-UAW agreements, Hamilton's inability to secure such a license is closely related to his lack of qualifications as such an electrician. (Def. Ex. 5)

Hamilton took examinations for a certificate as a journeyman electrician with the City of Fort Worth (twice in 1972 and once in 1974) and failed the examination each time and was never issued a license as an electrician. (R. pp. 187-192)

In his oral deposition, Hamilton testified that he took and passed the examination and received a certificate as a journeyman electrician. However, he admitted in the trial court that this testimony had been false, testifying:

> "Q. You never received a journeyman's license, did you?
>
> A. No, sir.

[5]No one from American Manufacturing Co. testified at trial but advised GM that from October, 1972, to May, 1974, Hamilton worked for it primarily doing light electrical work "in an area where there is no heavy electrical work." (P.Ex. 6) Some of this work might be classified as journeyman work. (R. pp. 524-525)

Q. So the facts in that deposition are not true.
A. No." (R. pp. 192-196; Def. Ex. 25)[6]

GM Management's Consideration of Hamilton's Application

After Labor Relations reviewed all of the information which Hogge had submitted, there was a conference of those in top management. The witness, Don Whitney, testified:

> "Q. Do you recall what date now?
>
> A. On June 27th we had a meeting with the plant manager, the plant engineer, the personnel director, and myself at which time we decided that Mr. Hamilton would be tendered a job offer."
>
> * * * *
>
> "Q. Yes. Now, how long did that meeting last?
>
> A. Roughly three hours." (R. pp. 969-970)
>
> * * * *
>
> "Q. Based upon your experience in the ten years, tell the Court the case that has received the most personal attention by you and by the entire plant management at the Arlington, Texas, plant.
>
> A. This particular case of the hiring of Rogers Hamilton received more personal consideration from both general supervisors, Labor Relations Division and supervisor of Employment Division,

[6]Notwithstanding this evidence of Hamilton's unquestionable lack of experience and qualifications, Petitioner at page 32 of the Petition claims that the trial court's Finding No. 40 (that on May 8, 1974, Hamilton did not have the 8 years journeyman electrical work required by the GM-UAW agreements) was without support in the record.

> as well as other staff in the plant than any I can recall." (R. p. 972)

Typical of the inaccuracies in the Petition is the statement at page 10:

> " . . . nine white electricians were hired almost as soon as they applied, and without having submitted any documentation of previous employment, (Plaintiff's Exhibit #4)."

Then at page 14, Petitioner cited P. J. Blubaugh as an example of alleged disparate treatment. Blubaugh testified:

> "Q. And that you first—well, that your items of documentation were not submitted until June 17, '74; June 21, '74, and July 3rd, '74. The question is: you were not asked to submit the documentation until sometime after you were hired, were you?
>
> A. I had brought with me my DD214N, my recommendation from Mike Brown and American Manufacturing. And they wanted to see more than just the recommendations. They wanted to send out to the people that I had worked for." (R. p. 765)

The DD214N form referred to in the answer showed that Blubaugh had been in the U.S. Navy. He was an electrician trainee on the U.S.S. Enterprise in 1963. He was promoted to electrician fireman and then attended the Navy's electrician school. He was next assigned to the U.S.S. Forrest Royal, where he

was responsible for all electrical work on the ship. After his discharge in 1967, Blubaugh did journeyman electrical work for Brown Electrical Co., American Manufacturing Co. and others until he applied for work at General Motors. (R. pp. 750-754) He is licensed as a journeyman electrician by the City of Fort Worth. (R. p. 760)

We have reviewed the significant facts in some detail with the belief that this factual analysis will be of maximum helpfulness to the Court in determining whether the cases cited by Petitioner have any application whatsoever to this case.

ARGUMENT

Reasons for Denial of the Writ

Employment discrimination cases in general primarily turn upon the Court's analysis of the particular facts involved and the credibility of the witnesses, *Hayden v. First National Bank of Mount Pleasant, Texas*, 595 F.2d 994, 997 (5th Cir. 1979); and, as such, are particularly inappropriate for review by writ of certiorari, *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1924). The trial court in this case made 53 findings of fact including both subsidiary and ultimate findings of fact. The standard for review of such findings is contained in Rule 52(a) of the Federal Rules of Civil Procedure which provides that "[f]indings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the

trial court to judge of the credibility of the witnesses." (emphasis added)

The record in this case amply supports the subsidiary findings of fact made by the trial court which in turn support the trial court's ultimate findings that GM did not discriminate against Petitioner in any respect. Furthermore, the record supports the lower court's finding that oral interviews by GM in its application process for entry into the skilled trades were not used as a mechanism for discrimination against blacks at the Arlington assembly plant.

Petitioner has not presented any of the reasons listed in Rule 19 of the rules of the Supreme Court as a proper basis for this Court to grant a writ of certiorari in this case. Petitioner has not shown that the Court of Appeals' decision is in conflict with the decisions of another Court of Appeals on the same matter, or that the Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court.

Petitioner's sole basis for seeking a writ of certiorari for review by this Court is an alleged conflict between decisions rendered by the *same* Court of Appeals. Respondent submits that even if there were a direct conflict between decisions rendered by the Fifth Circuit, it would not be a basis for granting a writ of certiorari. However, we will show that the decision of the Court of Appeals is not in conflict with its own prior decisions. Furthermore, Petitioner alleged such a conflict in his Motion for Rehearing en banc in the Fifth Circuit, but the Judges of the Fifth

Circuit failed to perceive such a conflict and denied the Motion for Rehearing en banc.

The Opinion of the Court of Appeals Is Not in Conflict With Its Prior Decisions

Rowe v. General Motors Corporation

When the Fifth Circuit handed down its Opinion in *Rowe*, it left no room for speculation as to the scope of its holding, saying:

> "All we do today is recognize that promotion/transfer procedures which depend *almost entirely upon the subjective evaluation* and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against blacks much of which can be covertly concealed and, for that matter, not really known to management." (457 F.2d at p. 359) (emphasis added)

Later decisions of the Fifth Circuit have shown beyond doubt what it meant in *Rowe* by "subjective evaluation." For example, in *Robinson* v. *Union Carbide Corporation*, 538 F.2d 652 (5th Cir. 1976), the Court found such subjectivity in the promotion decision based upon the questionnaires and evaluation forms used by Union Carbide requiring the interviewer's evaluation concerning a candidate's "adaptability," "bearing, demeanor, manner," "verbal expression," "maturity," "drive," and "social behavior."

A prima facie case of discriminatory employment practices in job allocations was also found in *James v. Stockham Valves and Fittings Company*, 559 F.2d 310

(5th Cir. 1977), wherein the Court, citing *Rowe*, said:

> "Here initial job assignments were made on the basis of decisions by white departmental supervisors without any formal selection standards or written guidelines. Similarly, transfer decisions were made without objective standards by the largely white supervisory staff. For promotions, seniority controlled only when the supervisor decided that applicants were approximately equal in qualifications, a largely subjective decision made by predominantly white supervisors." (559 F.2d at p. 330)

In each of these cases, the court focused on the presence of subjective evaluation procedures and their potential for discriminatory use. However, the record in the case at bar clearly demonstrates that the procedures utilized at the Arlington Plant to review Hamilton's application for entry into a skilled trade were based upon objective rather than subjective criteria. As stated by the Fifth Circuit in *Hamilton*, the test set forth in *Rowe* is one of "objective fairness" and accordingly each case must be evaluated on its facts.

Objective criteria for the ultimate hiring decision with regard to Hamilton were found in the GM-UAW collective bargaining agreement. As the Fifth Circuit noted at 606 F.2d 580 of its opinion in *Hamilton:*

> "In the instant case, unlike *Rowe*, there is a valid objective criterion, the qualification required by the collective bargaining agreements. We are not prepared to say that the existence of subjective oral interviews in the employment process will render that process per se discriminatory

where there are meaningful, known objective standards involved."[7]

When the test of objective fairness first announced in *Rowe* is applied to the facts of this case, the record demonstrates that the procedure used to evaluate Hamilton did not grant veto power to the interviewers and valid objective criteria existed in the GM-UAW agreement as to the method of selecting personnel for entry into the position of electrician. The decision in *Hamilton* was a reasoned application of the *Rowe* test of objective fairness to the facts of this case.

Parson v. Kaiser Aluminum

Similarly, there is no conflict between the decision in *Hamilton* and *Parson v. Kaiser Aluminum*, supra. The trial court in *Parson* dismissed the individual suit of Parson and a co-plaintiff as well as the class claims at the conclusion of the plaintiffs' testimony, and found that the promotion procedures used at the Plant contained appropriate safeguards to ensure that blacks would be given consideration equal to that of whites. However, a panel of the Fifth Circuit found that the trial judge erred in considering plaintiff's individual claim as if his promotion requests had been processed under a procedure which had not been adopted until six years after he filed his application, and remanded the case for a reevaluation under the

[7]In his Petition for Rehearing en banc, Petitioner for the first time questioned the requirement set out in the GM-UAW agreement requiring 8 years experience as an electrician or the functional equivalent. It is well settled in the Fifth Circuit that a party cannot for the first time raise a new theory or issue on appeal that was not presented to the Court below. *Capps v. Humble Oil & Refining Co.*, 536 F.2d 80 (5th Cir. 1976); *Autrey v. Williams and Dunlap*, 343 F.2d 730 (5th Cir. 1965).

promotion standards which existed at the time of his application. The panel also noted that at the time Parson made his request, Kaiser gave shift foremen veto power over any applicant and specified no substantive criteria for guiding selections.

However, the procedures condemned in *Parson* bear no similarity to the procedure utilized by GM to evaluate Hamilton. The procedures employed at the GM Plant did not depend upon the subjective evaluation and favorable recommendation of the immediate foreman or anyone else. No one person had the authority to turn down Hamilton's application. The record demonstrates that the interviews of Hamilton by the chief electrician and general maintenance foreman were fair and related directly to the qualifications of Hamilton to perform electrical work at the Plant. Similar interviews were given and similar standards were applied to the white applicants who applied for jobs as electricians during the 1974 emergency, including 19 white applicants who were found to be disqualified. (R. p. 527)

Griggs v. Duke Power Co.

At page 11 of the Petition, the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is mentioned with a vague intimation that it has some application to the facts of this case. Petitioner acknowledges that *Griggs* does not address the question he seeks to have this Court raise without any basis in the record or in the decision of the Court of Appeals. In fact, *Griggs* supports the decision below.

In *Griggs*, this Court noted that:

> "On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." (401 U.S. at p.431)

This Court concluded its Opinion with the statement:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." (401 U. S. at p. 436)

The electricians' interviews of Hamilton related solely to questions about his electrical experience and qualifications.

CONCLUSION

Petitioner has failed to demonstrate that there are any grounds for the exercise of this Court's discretionary certiorari jurisdiction. The holdings in the Fifth Circuit conflict with no decision of another Court of Appeals nor of this Court. The Court of Appeals has not erroneously decided an important question of federal law nor is any important question of federal law presented by the Petition.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Ira Butler, counsel for General Motors Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 16 day of May, 1980, service of this Brief in Opposition to the Petition for Writ of Certiorari has been made upon Petitioner, Rogers Hamilton, by mailing three copies thereof by United States mail postage prepaid to Bill Kimble, West Texas Legal Services, First Savings Building, Suite 400, San Angelo, Texas 76903 and three copies to Don Gladden, 2814 Avenue D, Fort Worth, Texas, 76105, counsel of record for Petitioner.

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